



**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

██████████  
██████████  
██████████  
██████████

DECISION

MED-48/100491

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 5, 2008, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Polk County Dept. of Social Services in regard to medical assistance, a hearing was held on January 28, 2009, at Balsam Lake, Wisconsin.

The issue for determination is whether a trust set up for the petitioner is available.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

██████████  
██████████  
██████████  
██████████

Respondent:

Wisconsin Department of Health Services  
1 West Wilson Street, Room 651  
P.O. Box 7850  
Madison, WI 53707-7850

By: Linda Neely, ESS  
Polk County Dept Of Social Services  
100 Polk County Plaza, Suite 50  
Balsam Lake, WI 54810

**ADMINISTRATIVE LAW JUDGE:**

Michael D. O'Brien  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (██████████) resides in Polk County.
2. The petitioner has been living in a nursing home since June 16, 2008.

3. The petitioner applied for medical assistance on October 22, 2008. The county agency denied her application because it contends that her assets exceed the program's limit.
4. On June 6, 1991, the petitioner's children set up a family trust for the benefit of the petitioner and her late husband. It made one of the children the trustee. The trust indicated that it was for the following purpose:

The purpose of this trust to provide for the general support and welfare of [Petitioner's husband] and [Petitioner], in the sole discretion of said Trustee, such support may be needed. It is the intention of the Grantors that such of the income and corpus of the trust as may be necessary to provide for the support and general welfare of [Petitioner's husband] and [Petitioner], be used when there are no other funds available for such purposes: specifically such funds shall be used to supplement any funds they are entitled to receive as social security and medical assistance benefits.

5. On June 6, 1991, the petitioner and her late husband transferred real estate and other property worth \$236,460.67 at the time to their children by a warranty deed. The children transferred the property to their parents' family trust that same day.
6. On January 1, 1992, the petitioner and her late husband transferred two pieces of real estate to their children. The children transferred the property to their parents' family trust that same day.

#### DISCUSSION

A person is ineligible for medical assistance if her available assets exceed \$2,000. Wis. Adm. Code, § DHS 103.06(1)(a); Wis. Stat. § 49.47(4)(b)3g. Section 49.454, Wis. Stats., determines when a trust is considered available. It applies in medical assistance matters "if assets of the individual or the individual's spouse were used to form all or part of the corpus of the trust" and the trust was set up by the individual, her spouse, or someone acting on the individual's behalf or request. Wis. Stat. § 49.454(1)(a). All revocable trusts covered by the statute are available; irrevocable trusts covered by the statute are available "[i]f there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual" seeking or receiving medical assistance. Wis. Stat. § 49.454(3)(a). This provision does not apply to trusts set up by others for the individual's benefit. Wis. Stat. § 49.454(1)(b) and (4).

The difference between trusts created by the individual seeking medical assistance and those created by a third party are explained in the *Medicaid Eligibility Handbook*, §§ 16.6.4.1. and 16.6.4.2. Section 16.6.4.1 states:

If the resources of someone other than the individual or their spouse (i.e. a third party), were used to form the principal of an irrevocable trust, the trust principal is not an available asset unless the terms of the trust permit the individual to require that the trustee distribute principal or income to him or her.

Section 16.6.4.2 states:

If the resources of the individual or the individual's spouse were used to form all or part of the principal of the trust, some or all of the trust principal and income may be considered a non-exempt asset, available to the individual. If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual at any time no matter how distant, the portion of the principal from which, or the income on the principal from which,

payment to the individual could be made shall be considered non-exempt assets, available to the individual.

This treatment applies regardless of:

- the purpose for which a trust is established;
- whether the trustees have or exercise any discretion under the trust;
- any restrictions on when or whether distributions may be made from the trust; or,
- any restrictions on the use of distributions from the trust.

The petitioner's children established a family trust for her and her late husband on June 6, 1991. That same day, the petitioner and her husband transferred over \$200,000 in personal and real property to their children, who then immediately transferred the property into the trust. Seven months later, the petitioner and her late husband transferred additional real estate to their children who again immediately transferred it to their parents' trust. The petitioner contends that because she momentarily transferred her assets to her children, her trust was set up with their funds and not hers, and therefore that the more lenient rules for trusts set up by third parties apply.

I disagree. Trusts set up with the individual's own assets are distinguished from those set up by a third party for a practical reason. If trusts set up by third parties with no legal obligation to support the individual had to be used in lieu of medical assistance to pay for the individual's medical care, those third parties would have no incentive to set up the trust because their money would become a donation to the government rather than the individual. On the other hand, persons are expected to contribute their own available resources toward their health care before becoming a burden to the taxpaying public. There is no third person in this matter who decided to support the petitioner and her late husband out of the third person's own funds. To call the petitioner's children third persons implies that when the money was transferred to them, they could have kept the money for themselves, but instead, out of the goodness of their hearts, decided to set up a trust for mom and dad's benefit with their new-found riches. Such an interpretation is nonsense because the various transfers were never meant to help the children but rather were designed solely to use the petitioner's resources to set up a trust for her own benefit. Because her resources were used for the trust, Wis. Stat. § 49.454(3)(a) applies.

Furthermore, the legal foundation of the petitioner's argument is that she divested her assets when she gave them to her children. Because the divestment occurred more than five years before she entered a nursing home it would not make her ineligible. Wis. Stat. § 49.453(1)(f)1m. A divestment occurs when an the person seeking medical assistance "disposes of resources at less than fair market value." Wis. Adm. Code, § DHS 103.065(4)(a). A divestment does not occur if the "individual intended to dispose of the resource either at fair market value or for other valuable consideration." § DHS 103.065(4)(d)a. Although the money was transferred to the petitioner's children, this was merely an intermediate step in setting up the trust, which, as noted, was solely for the benefit of the petitioner and her late spouse. Therefore, even if one considers this brief transfer a disposal of resources—a dubious proposition given that the children supposedly receiving the resources never had them for their own use and received no direct benefit from them—the petitioner and her late spouse received "other valuable consideration" in the form of a trust. This trust, for all practical purposes, provided them with as much income and assets as they had before it was set up. Therefore, I reject the argument that a divestment occurred.

Because Wis. Stat. § 49.454(3)(a) applies to this matter, the petitioner's trust is available if there are circumstances under which payment from it could be made to or for her benefit. The trust provides that the petitioner can receive "such of the income and corpus of the trust as may be necessary" for her "general support and welfare." Because there are circumstances in which the trust can be made to or for her benefit, the county agency correctly found that it is an available asset that counts against her medical assistance asset limit.

### CONCLUSIONS OF LAW

The county agency correctly determined that the family trust established for the petitioner's benefit in 1991 is an available asset that makes her ineligible for medical assistance.

**NOW, THEREFORE, it is ORDERED**

That the petition herein be and the same hereby is dismissed.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wisconsin Statutes § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

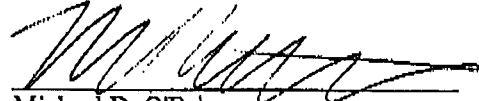
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Wisconsin Department of Health Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

THIS IS A CERTIFIED COPY OF THE FINDINGS AND DECISION MADE IN THIS MATTER AND FILED IN THE DIVISION OF HEARINGS AND APPEALS IN THE CITY OF MADISON, WISCONSIN.

Given under my hand at the City of Eau Claire, Wisconsin, this 16th day of March, 2009.

  
Michael D. O'Brien  
Administrative Law Judge  
Division of Hearings and Appeals  
39/MDO

cc:

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